Medical Investors Association *and* Local 32B-32J, Service Employees International Union, AFL-CIO. Case 29-CA-8131

March 15, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On October 26, 1981, Administrative Law Judge Winifred D. Morio issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Medical Investors Association, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] Since we agree with the Administrative Law Judge's conclusion that Mihail (Michael) Muraciov is a supervisor within the meaning of Sec. 2(11) of the Act, we find it unnecessary to consider whether in other respects his duties made him an agent of Respondent.

[3] In her notice, the Administrative Law Judge inadvertently omitted a portion of the cease-and-desist order. Accordingly, we have attached a corrected notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate our employees concerning their membership in and activities on behalf of Local 32B-32J, Service Employees International Union, AFL-CIO, or any other labor organization.

WE WILL NOT discourage membership in the Union, or any other labor organization, by discharging our employees, or in any manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT refuse to recognize or bargain with the Union as the exclusive bargaining representative of the employees in the unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Jimmie Sosa, Amada Colon, Amjad Ali Choudri, and Tahizjan Ruzehaji immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay, together with interest thereon, due them by reason of their discharge.

WE WILL, upon request, bargain collectively with the Union as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a written, signed agreement. The bargaining unit is:

> All superintendents, handymen and/or porters employed by the Employer at its premises located at 34-33 90th Street, Queens, New York, exclusive of office clerical employees, guards and supervisors as defined in the Act.

All our employees are free to become or remain, or refuse to become or remain, members of the Union or any other labor organization.

MEDICAL INVESTORS ASSOCIATION

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge: This case was heard before me on March 25, 26, 27, 30, and 31, 1981, in Brooklyn, New York, pursuant to a complaint issued by the Regional Director for Region 29 on August 18, 1980. The complaint, based on charges filed by Local 32B-32J, Service Employees International Union, AFL-CIO (herein called the Union) on July 2, 1980, against Medical Investors Association (herein called the Respondent) alleges, *inter alia*, violations of Section 8(a)(1), (3), and (5) of the Act in that Respondent interrogated its employees and discharged them for their participation in and activities on behalf of the Union; refused to recognize and bargain with the Union although a majority of the employees had designated and selected the Union as their bargaining representative; and refused, with one exception, to reinstate discharged employees. The complaint also alleges that Respondent, by engaging in such conduct, has made the holding of a fair election impossible. Respondent denies that it has engaged in the conduct as alleged.

All the parties were given a full opportunity to participate in the proceeding, to introduce all relevant evidence, to cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by both parties.

Upon the entire record in this case, and my observation of the demeanor of the witnesses, and after careful consideration I make the following:

FINDINGS OF FACT

I. JURISDICTION

Medical Investors Association is a limited partnership with general partners B. Chary and Medical Investors Corp. Its principal place of business is located at 510 West 110th Street, and 950 Third Avenue, New York City, New York, at the office of Robeson and Miller, where it is and has been at all times material herein involved in the investment business and in owning and providing apartment management services and related services for six buildings located at 34-33 90th Street, Queens, New York. Respondent, during the course and conduct of its business operations, owned and operated apartment buildings and derived gross revenues and rents therefrom annually in excess of $500,000. Respondent, also annually, in the course and conduct of its business operations purchased and caused to be delivered to its apartment buildings oil and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to it and received from other enterprises, including, *inter alia*, Cibro Oil Co., located in the State of New York, each of which enterprises had received said goods and materials in interstate commerce directly from States of the United States, other than the State in which it is located. The parties admit and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. CONTENTIONS OF THE PARTIES

It is the contention of the General Counsel that on June 13 the Union was selected as the collective-bargaining representative by a majority of the superintendents, porters, and/or handymen employed by Respondent at its apartment complex in Queens.[1] Thereafter the Union notified Respondent, by letter on or about June 18, of its representative status in this appropriate unit of employees but Respondent refused to accept the letter. The Union then filed a petition with the State Labor Relations Board on June 24, a copy of which was forwarded on that day to Respondent. Upon receipt of this letter, Respondent interrogated its employees about their union activities, and between June 26 and 30 discharged Jimmie Sosa, Amada Colon, Amjad Ali Choudri, Guillermo Wong, and Tahizhan Ruzehaji.[2] This conduct made the holding of a fair election impossible.

Respondent takes no position with respect to the appropriateness of the unit, it leaves the issue to the Board's determination. However, it denies any knowledge of union activities by its employees prior to the discharges which, it contends, took place on June 24. It asserts that the discharges were caused solely by the incompetent work performance of the discharged employees. Further Respondent contends that even if there had been a dual motive for the discharges it is clear, based on the record, that even absent the protected activity the discharges would have occurred.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The events in this case occurred at a six-building complex consisting of 300 to 324 apartments, located at 90th and 91st Street, Jackson Heights, Queens, New York. Vasudev Nayak, a general partner of the business, testified that Respondent became the owner and operator of the complex in January by payment of the sum of $500,000 in cash with the remainder of the purchase price secured by a mortgage. Nayak retained Michael Muraciov and Nelson Diaz, both of whom had been employed by the prior owner, in his employ but he discharged all other employees and began hiring new employees about March. The new employees included Frank Gotay, Jimmie Sosa, Amada Colon, Tahizjan Ruzehaji, Amjad Ali Choudri, and Guillermo Wong. The status of Muraciov and Gotay is in dispute; all the other employees are conceded to be either porters and/or handymen.

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[1] All dates refer to 1980.

[2] The complaint was amended during the hearing to delete the name of Guillermo Wong. It was also amended to delete that portion of par. 19 which alleges that Respondent conditioned reinstatement of the discharged employees upon the renouncement of their membership in and adherence to the Union.

B. *The Status of Muraciov and Gotay*

Respondent contends that the employees were supervised by Vasudev Nayak, that Muraciov was the head superintendent who had no supervisory authority, and that Gotay was an independent contractor. The record does not support these contentions.

Initially it should be noted that Nayak testified that he had little direct contact with the porters and my observation of Nayak leads me to the conclusion that it would be totally out of character for him to supervise porters.[3] Further the record establishes that Nayak was not at the complex every day and when he did come to the office it would be around 10 a.m. while the workday for the other employees commenced at 8 a.m.[4] Finally the evidence establishes that Nayak's time, while at the office, was spent doing paper work. Thus in order to accept Respondent's contention that it was Nayak who supervised the employees it becomes necessary to accept the premise that this employer permitted employees to remain totally unsupervised for days at a time, with little or no contact with management. This type of laissez-faire management is very odd when one considers Respondent's basic defense, i.e., the employees were discharged because they were not and had not been performing their work in a proper fashion. I do not credit that Nayak or any other businessman operates a business in this fashion and I do not, therefore, accept Respondent's contention that Nayak supervised the porters. The porters, therefore, were supervised by either Muraciov or Gotay. Respondent claims that Muraciov performed some work similar to that performed by the other employees and that he was the head superintendent.[5] Gotay and the other employees denied that Muraciov ever performed work similar to that performed by them. All denied that they had ever heard the term, head superintendent, prior to the hearing. All the employees, throughout their testimony, referred to Muraciov as the manager of the building and to Gotay as the superintendent. Further they all claimed that Muraciov did work in the office with the Nayaks. Muraciov admitted that at least a portion of his time was devoted to office work, that he took care of the violations and handled the mail. It was also his testimony that he supervised the porters. The testimony of Gotay and the other employees supports that testimony. Gotay claimed that Muraciov assigned the work, using independent judgment, not only to him but to the other employees. Muraciov testified initially that he prepared the work assignments for the employees. Thereafter he testified that both he and Gotay prepared the assignments and that together they checked the work of the other employees. I do not credit that Gotay made such assignments or checked the work of other employees except at Muraciov's direction. Muraciov does not speak Spanish while Gotay does and it was in his capacity as a translator for Muraciov that Gotay occasionally spoke to the Spanish-speaking employees about their work. This fact is best demonstrated by Muraciov's own testimony. Thus he testified that he had an occasion to criticize Colon for coming to work late but because he could not speak Spanish and Colon could not speak English he requested Gotay to speak to Colon about the matter. Muraciov also testified that after receiving tenant complaints about Sosa's work it was he who reprimanded Sosa. Sosa stated that Muraciov interviewed him and that the decision to hire him was made by Muraciov. Both Colon and Sosa claimed that Muraciov discharged them.[6] Gotay further testified that Muraciov, on his own authority, had permitted him to leave work early.[7] The employees testified that it was Muraciov who gave them their paychecks and Nayak testified that Muraciov, on occasion, prepared paychecks.

Based on the testimony in this record I find that Muraciov possessed and exercised the authority to hire employees, to assign work using independent judgment, to issue warnings to employees, and to grant permission for time off to employees. Accordingly, I find that Muraciov is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent acting on its behalf.[8] Assuming *arguendo* that Muraciov did not possess or exercise the indicia of supervisory status, I would nevertheless find that he was an agent of Respondent acting on its behalf. This record establishes that Nayak, by virtue of his absence from the premises for days at a time and the authority he had given to Muraciov, had placed Muraciov in such a position that the employees could reasonably believe that Muraciov spoke for Respondent.[9]

As noted, it is Respondent's contention that at the relevant times Frank Gotay was an independent contractor. This record refutes this contention.

Gotay was hired in March 1980 by Nayak. Nayak did not testify directly concerning Gotay's status.[10] Gotay testified that he was hired as a superintendent at a weekly salary of $225 to maintain the boilers and perform general maintenance work, including plumbing and carpentry, at the complex. The other employees referred to Gotay as the superintendent and agreed that his basic responsibility was to maintain the boilers. In addition, and as is usual in the case of a superintendent, Gotay was given an apartment at the complex as a part of his compensation. The terms of the lease for the apartment were set by Muraciov as were the hours Gotay worked, i.e., from 8 a.m. to 5 p.m., 5 days a week. Gotay testified that he was also on call 24 hours a day at the complex. Muraciov did not testify with respect to these statements.

[3] Nayak could not recall the name of any porter without the use of his payroll records. He also testified that due to his upbringing he would not even see the porters if they came before him.

[4] It was Nayak's testimony that he usually came to the office on Wednesday. Muraciov testified that initial assignments were given to employees around 8 a.m. each day.

[5] Nayak testified that although he never saw Muraciov do the work, he believed that he maintained the boilers.

[6] These discharges will be discussed below. Muraciov does admit that he personally told Sosa he was discharged albeit he did it at Nayak's direction.

[7] Gotay claimed that both Nayaks also had permitted him to leave work early.

[8] *Gurabo Lace Mills, Inc.*, 249 NLRB 658 (1980).

[9] *Han-Dee Pak, Inc.*, 249 NLRB 725, 729 (1980).

[10] Respondent's counsel stated that Gotay was an independent contractor. Nayak never referred to Gotay in this fashion but at one point in his testimony there was an inference that he called Gotay an assistant superintendent. Thus Nayak testified, "He [Muraciov] was the superintendent, but since he was senior, the man who was there for the longer period of time, you could consider him chief superintendent."

Gotay also claimed that on occasion he performed additional work for Nayak for which he received moneys beyond his weekly salary. Although Respondent's counsel argued that these additional moneys establish that Gotay was an independent contractor, the fact remains that neither Nayak nor Muraciov testified in contradiction to Gotay's testimony that the money was paid solely for work he performed beyond his usual duties. This record also fails to disclose that Gotay could determine what work he wanted to do, could refuse to do assigned work, or could unilaterally change any other term or condition of his employment. There is no evidence that Gotay determined the salaries for other employees or the deductions that were to be made from their salaries. In view of the total lack of control by Gotay over his employment conditions, I do not consider the fact that state and Federal deductions apparently were not made from his salary to be evidence of an independent contractor status.[11] In sum there is no evidence that Gotay could control the manner and means by which the work was to be performed, a requirement necessary to establish an independent contractor status within the meaning of Section 2(3) of the Act.[12] Respondent does not contend that Gotay was a supervisor and this record fails to establish that Gotay possessed or exercised, at the relevant times, any of the indicia of supervisory status. As noted above Gotay did, at times, act as a conduit for messages that Muraciov wanted to relay to the Spanish-speaking employees but this conduct, absent other evidence of supervisory status, is insufficient to warrant a conclusion that Gotay was a supervisor within the meaning of the Act.

C. *The Appropriate Unit*

On June 13, Respondent had in its employ one superintendent, Frank Gotay, and six porter/handymen, including Nelson Diaz, Jimmie Sosa, Amada Colon, Tahizjan Ruzehaji, Amjad Ali Choudri, and Guillermo Wong. The Union secured authorization cards from all of them on that day. The record reveals that the six porter/handymen all performed general maintenance work, and Gotay, who did not possess or exercise any indicia of supervisory status, performed some of the maintenance duties performed by the porters and handymen. Accordingly, I find that a unit consisting of superintendents, porters and/or handymen exclusive of all office clerical employees, guards and supervisors as defined in the Act constitutes an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act.[13]

D. *The Events*

On June 13, as a result of a phone call by Gotay, Anthony Poccio, a business agent for the Union, met with Gotay and the six above-named employees in Gotay's apartment, which was in the complex. After an explanation by Poccio of the union benefits and a discussion among the employees concerning union membership, the six porters and Gotay signed authorization cards designating the Union as their representative.[14] Thereafter, according to Thomas Latimer, a contract director for the Union, he forwarded a certified letter, return receipt requested, on June 18 to Respondent advising it that the Union represented its employees.[15] The letter was returned unopened to the Union.[16] The envelope containing the returned letter had a checkmark next to the "return to sender" box and bears the words "refused" across the front of the envelope. The name and address of the Union is clear on the face of the envelope. Respondent denies that such a letter was delivered to it or refused by it. However, Sosa, one of the discharged employees, claimed that sometime between June 13, when he signed the authorization card for the Union, and the day he was discharged, which was around June 26, he was in the office waiting for work to be assigned to him. At the time, Gotay, Muraciov, and the Nayaks were in the office. Sosa testified that he observed a Spanish mailman hand a letter to Gotay and heard him ask for a signature. Gotay gave the letter to Muraciov but Nayak asked to see the letter. The letter was given to him, he looked at it and returned it to Muraciov who then gave it to the postman without opening or signing for it. Nayak and Muraciov deny that any such incident occurred.[17] Gotay did not testify with respect to this incident. Thereafter, on June 24 the Union filed a representation petition with the State Labor Relations Board.[18] A representative from that board testified that, in accordance with their usual procedures, a conference letter was sent to the parties on the same date the petition was filed, June 24.[19] According to Nayak this letter from the State Board was not received until July 2. However, Gotay, Diaz, Sosa, and Colon all testified that Respondent's representative interrogated them about the Union on or about June 26 and 27.

According to Jimmie Sosa on June 26 about 8 a.m. he went to the office to secure the equipment necessary to do his work. When he entered, he saw Muraciov and questioned him as to whether he knew where the brooms were because he could not find them. Muraciov replied that he did not know and the conversation ended. Sosa left the office, went to the basement and there found the broom and a shopping cart so he proceeded to sweep the sidewalk in front of the building. Within a few minutes Muraciov came out and told him that he should not be doing that work. When Sosa asked whether there was something else that he wanted him to do Muraciov told him he was terminated, as were all the other employees.

[11] It appears from the record that Respondent failed to have the proper withholding forms signed by some of its employees.

[12] *Air Transit, Inc.*, 248 NLRB 1302, 1306, 1309 (1980).

[13] *Kenneth and Harald Torsoe d/b/a Longview Terrace Co.*, 208 NLRB 699, 700 (1974).

[14] G.C. Exhs. 2 through 8. I credit Poccio's testimony that he told the employees that there was a $60 initiation fee and a monthly fee of $10. There is no evidence that Gotay, during the meeting, took a more active part than any of the other employees in the meeting.

[15] G.C. Exh. 9(a).

[16] G.C. Exh. 9(b).

[17] Both testified that the person who made regular mail deliveries to the premises was a black woman named Lula.

[18] The Union apparently did not realize that Respondent was within the jurisdiction of this Board.

[19] G.C. Exhs. 16(a) and (b).

When Sosa questioned him as to the reason for the terminations Muraciov did not respond directly to him but did say as he walked away, "You shouldn't have joined the Union." Sosa waited at the premises until about 10:30 a.m. to speak with Nayak as to the reason for his termination. He met with Nayak but could not recall if Mrs. Nayak also was present. When he asked the reason for his discharge, Nayak told him that Muraciov did not want him and did not want Amada Colon and that he, Nayak, "listened" to his manager and that was going to be it. Sosa claimed that Nayak said that he knew Sosa was a good worker and he would be glad to give him a letter of recommendation.[20] Amada Colon testified that on either June 26 or 27, the day he was discharged, he reported for work to the office as usual. Muraciov was there and told him that Nayak did not want the Union, and that since he joined the Union there was no longer work for him and he should go home.

Frank Gotay also testified about a conversation he had with Nayak concerning the Union about 10:30 a.m. on June 26. During this conversation Nayak showed him a letter with the words "Labor Board" on it and questioned him as to whether he had joined a union. When Gotay replied that he had joined, it was no "big deal," he wanted the union benefits, Nayak told him that he wanted to fire all the porters and he asked to see them.[21]

Nelson Diaz claimed that around June 26 he was called to Nayak's office about 11 a.m. Frank Gotay also was present. Nayak asked him whether he had signed a union card and he replied that he had signed in order to get the benefits. Nayak did not say anything but sent him back to work. Gotay, although initially testifying that he was not present, recalled subsequently that he was present and heard this interrogation.

Tahizjan Ruzehaji testified that at some point after he signed a union card he reported for work as usual at 8 a.m. He was told by Muraciov to return home because there was no work for him. Ruzehaji did not recall what date this occurred, but it was after he signed a card for the Union. The complaint alleges that Ruzehaji was discharged on or about June 27 and the answer admitted this allegation although during the hearing it was the position of Respondent that all employees were discharged on June 24.[22]

Nayak admitted talking to Gotay about a letter from the Labor Board but places this as occurring in July.[23] Both he and Muraciov deny all other statements about the Union attributed to them by the employees. Respondent contends that the discharges were caused by the problems it was having with various government agencies, which problems were attributable to the poor work performance of the employees. There is no dispute that Respondent was receiving summonses for building violations. The employees did not deny that there were violations. Nayak testified that there had been some violations found as early as March but the number increased significantly so that by April and May he was receiving as many as 20 summonses a week. Muraciov also testified that there were violations, he recalled one day in the month of April when he received 18 summonses for violations at the building entrances.

Nayak claimed that he never spoke to the employees directly about anything. As noted, Muraciov recalled that sometime in May he asked Gotay to speak to Colon about coming in late and at some point he spoke to Sosa about his poor work performance. He also claimed that he spoke to Guillermo Wong and Amjad Ali Ghoudri about their unsatisfactory performance. However, it does not appear that Respondent, during the month of April when the number of summonses increased, made any effort to replace the employees. It is unclear, based on this record, whether these summonses were given because of work poorly performed by the employees or were due to conditions over which the employees had no control. In any event there was a rent strike by the tenants at some point in April or May. On June 23, Nayak signed a voluntary agreement with the Department of Housing, Preservation, Development wherein he agreed to correct the violations by September 1980. Nayak alleged that he was told that if the corrections were not made he would lose the building. When told this, Nayak explained to the court that he had six employees who were responsible for the upkeep of the building. He was advised that it was his responsibility to maintain the building and that if he had incompetent people he should "fire them." Nayak claimed that, after executing the agreement, he immediately contacted an employment agency on June 24 and requested that new employees be sent to him. Thereafter, although normally he did not go to the office until Wednesday, he went directly to the office on June 24 to discuss the matter with Muraciov and Gotay. According to Nayak, during this meeting with Gotay and Muraciov he told both that if people were not working to "get rid" of them but not to do so all at once. Nayak explained that in his native country they had a saying, "When a husband goes to the market to buy cloth for clothes, the wife doesn't burn all the saris hoping the husband is going to bring a sari from the market."[24] In other words, Nayak told them not to discharge employees until at least some new employees were hired. According to Nayak, neither Gotay nor Muraciov said anything about the employees during the meeting although he (Nayak) specified that Colon was to be discharged.[25] At the conclusion of the meeting he signed the last payroll checks on June 24 for all the employees and that day was the last day of their employment. He left the checks to be distributed by Gotay and Muraciov to the employees. At that point, Respondent had not hired new employees.

[20] Sosa testified that he subsequently asked for work but received no response.

[21] Gotay initially set the date of this conversation as August. He subsequently testified that it occurred on June 26. It is obvious from the contents of the conversation that, if it occurred, it could not have been in August. There is no dispute that the employees were discharged in June.

[22] Ruzehaji who did not speak English, left the premises, and returned later that day with a relative. Ruzehaji then was reinstated and has continued to work.

[23] Muraciov also recalled Nayak questioning Gotay about the letter from the Labor Board but he too placed it in July.

[24] Nayak came from India.

[25] Nayak claimed that prior to this day he had observed Colon running around, apparently not doing any work.

Muraciov's recollection of the meeting differed somewhat from that of Nayak. According to Muraciov, Gotay was present during the conversation and Nayak did show them a paper and did tell them something about losing the building if the violations were not corrected. However, contrary to Nayak's testimony, Muraciov claimed that both he and Gotay specified the employees they thought should be discharged. Gotay expressed his opinion that Wong and Choudri should be discharged and he said tht he thought Sosa should be discharged. Subsequently Muraciov testified that it was agreed that he would tell Wong and Choudri that they were discharged and Gotay would tell Colon and Sosa. Muraciov also testified that at the conclusion of the meeting, "I prepared the payroll for the next day because Mr. Nayak told me he wanted to leave the place early and that I should come the next [sic] for to sign the check." Muraciov claimed that on June 25 when he gave paychecks to Wong and Choudri he told them they were discharged and on June 26 he discharged Sosa.[26] Thus it appears from Muraciov's testimony that the payroll checks were dated June 25.[27]

Gotay denied that he was present at any meeting where the discharge of employees was discussed.

Analysis and Conclusions

1. The discharges

Respondent's first argument is based on its claim that it had no knowledge of any union activities on June 24 when it discharged its employees for incompetent work performance and it therefore could not have discharged them because of their union activities. The second argument is that even if it is assumed that this case presents a dual motive situation the Board's holding in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), precludes a violation being found because this record clearly establishes that, absent protected activity, the same action would have occurred. Insofar as the bargaining order issue is concerned, Respondent contends it was under no obligation to bargain, it could allow the normal processes of the State Labor Relations Board to continue based on the petition filed by the Union.

With respect to Respondent's argument concerning lack of knowledge of union activities prior to July 2, Gotay, Sosa, Diaz, and Colon all testified that Respondent's representative spoke to them about the Union on or about June 26 or 27. However, Respondent argues that Sosa, Diaz, and Colon should not be credited for a variety of reasons and that Gotay was mistaken as to the date Nayak spoke to him about the Union. We will consider the various reasons advanced by Respondent for not crediting the four witnesses.

Sosa should not be credited, according to Respondent, because he deceived a governmental agency, fabricated a story about seeing a letter delivered, and gave contradictory testimony about the duties of Frank Gotay and about the last day of his discharge and the events that occurred on that day.

The record establishes that Sosa was employed by Respondent under the name of Huberto Mercado while simultaneously receiving unemployment checks under his correct name, Jimmie Sosa.[28] It is this conduct which demonstrates the propensity to deceive, and which requires all of Sosa's testimony to be discredited. Sosa admitted that he was receiving unemployment checks while working for Respondent. He testified that he had been receiving unemployment benefits prior to commencing work with Respondent and he did not disclose to the unemployment agency that he had a job because he was not sure that the job would continue and he thus would have neither the benefits nor the job. Needless to say such conduct cannot be condoned but it does not follow, as Respondent contends, that one who is false in one thing must be considered false in all things. An administrative law judge need not reject the testimony of a witness because the witness is not credible in all areas.[29] This is particularly true when other evidence tends to support the testimony of the witness. Diaz, Colon, and Gotay all testified that the Union was mentioned to them on or about June 26 and June 27. In addition, the representative from the State Labor Relations Board testified that a letter was sent on June 24 to Respondent notifying it of the Union's claim to representative status. Thus independent evidence tends to support Sosa's testimony.

With respect to the alleged fabrication of the delivery of the union letter of June 18, the fact remains that the envelope in which the letter was sent was marked "return to sender" and does contain the word "refused" on it. Respondent implied that the Union was responsible for these notations. However, a very similar situation happened with respect to the charge in the instant case. Respondent, in its answer, denied receipt of the charge and the envelope, which was returned to the Board, has the word "refused" on the front of it. Certainly there can be no assertion that the Board was responsible for the notations on this returned envelope.[30]

Respondent claims that Sosa's testimony with respect to Gotay and his duties was contradictory. The record does not support this assertion. An examination of the record establishes that Sosa admitted being in the office with Gotay and going to the office with Gotay. He denied, as did all other employees, that he ever saw Gotay working at a desk in the office.[31] The whole line of questioning dealt with the identity of the individuals who worked at desks in the office. Gotay, as did all other employee witnesses, testified that only Muraciov and the Nayaks worked at a desk in the office.

The other alleged discrepancies in Sosa's testimony relate to the day of his discharge. Sosa did testify that he was discharged on June 26, without stating the day of

[26] Muraciov claimed that it was Gotay who discharged Colon.

[27] Muraciov testified that he did not prepare a payroll check for an employee until the day that he was going to give the check to the employee.

[28] It appears that Respondent had some knowledge that Sosa used a different first name. Muraciov said that he was told Sosa's name was Jimmie and the check stubs he prepared for May 14 and May 28 have the name Jimmie on them (G.C. Exhs. 25(b) and (c)).

[29] *B. N. Beard Company*, 248 NLRB 198, 204 (1980).

[30] G.C. Exh. 1(b).

[31] Sosa's answer was given in response to questions posed by the Administrative Law Judge.

the week. That day was a Thursday, which Sosa on cross-examination testified was his normal day off. Muraciov, Respondent's witness, testified that he personally discharged Sosa on Thursday, June 26.[32] However, whether it is Sosa or Muraciov who is mistaken as to the date of the discharge is not of importance. I do not view such a minor discrepancy, if there was one, to be grounds to discredit Sosa's testimony. With respect to other events on that day, Respondent contends that Sosa's testimony differed from statements he made to the Board in the investigation. This is not supported by an examination of both the testimony and the affidavit. An examination establishes that Sosa testified substantially in accordance with the affidavit. Respondent claims that the affidavit contains the following statement, "I believe I was fired because I signed with the Union although I cannot prove it."[33] It is true that affidavit contains such a statement but it also contains the statement, which Sosa testified to, that Muraciov mumbled, "You should not have joined the Union."

According to Respondent, Nelson Diaz should not be credited because he denied that there was a rent strike although admitting that he had not paid rent for 6 months. The witness, although not terming it a rent strike, did testify that he was aware that the tenants had an action in court, and that some did not pay their rent. In similar vein Respondent claims that Diaz, in his testimony, denied that Gotay discharged him, while in the affidavit he gave to the Board he stated that it was Gotay who let him go. In reality, an examination of both his testimony and his affidavit establishes that it was Diaz' belief that although Gotay said the words to him, it was actually the owners who made the decision to discharge him.[34] I do not consider that these and similar minor variations warrant discrediting the testimony given by Diaz. It should also be noted that Gotay supported the testimony of Diaz.

Respondent did not attack the credibility of Gotay with respect to the interrogation. In fact Nayak admitted asking Gotay about the Union but placed the incident as occurring in July after, he claims, the letter was received from the Labor Board. As noted, a representative of the State Labor Board testified credibly that their letter notifying Respondent of the Union's claim of representation was prepared and sent on June 24 in accordance with the established practice of that agency. The letter is dated June 24. Respondent claims it did not receive that letter until July 2, some 8 days later. I am mindful that there have been some delays in the mail deliveries but the failure of mail delivery to this business establishment seems a bit unusual to say the least. The Union's letter of June 18 was not received, the charge sent by the Board was not received, and the letter from the State Labor Relations Board took 8 days to arrive. I do not credit Respondent's claim that it had no knowledge of the union activities of its employees until July 2. Rather I credit the testimony of the four employees, which testimony establishes that Respondent had knowledge of the union activities of its employees prior to the discharges.[35] Accordingly, I do not find validity to Respondent's first argument that it could not have discharged the employees because of their union activities because it had no knowledge of such activities. Therefore, consideration must be given to Respondent's second argument that this case is controlled by the decision in *Wright Line* and thus there can be no violation because it would have discharged the employees even absent their protected activities.

The first issue to consider with respect to this argument is whether in fact *Wright Line* is applicable to this case. In *Wright Line* the Board stated that there was a clear distinction between a "pretext" case and a "dual" motive case. The Board explained that in those cases where the reason adduced was pretextual an examination of the alleged legitimate business reason establishes that it either did not exist or that it was not relied on for the action taken by the employer. In the "dual motive" situation there exists the "good" (legitimate business) and the "bad" (antiunion) reason for the discharge.

I am not persuaded, based on this record, that the decision in *Wright Line* is controlling in the instant case. However, assuming that it is applicable, I do not find that Respondent has sustained the burden of demonstrating that the same action would have occurred even in the absence of the protected conduct.

It is undisputed that the employees had signed for the Union on June 13. Respondent contends that it was not this fact which caused the discharges but rather the discharges were caused by its fear of losing the building and the agreement it signed on June 23. Both Sosa and Colon credibly testified that they were told by Muraciov that they were discharged because of the Union. Gotay credibly testified that Nayak said he wanted to discharge the porters because of the Union. However, even absent this direct testimony, there is sufficient evident to establish that the discharges would not have occurred at all or would not have occurred when they did absent the union activities of the employees.

The fact that the buildings had numerous violations and that Respondent was involved in legal action because of this was well known to Respondent long before June. Both Muraciov and Nayak testified that summonses were received as early as March and in fact the bulk were received in April.[36] The alleged rent strike by the tenants commenced several weeks before late June. Nevertheless, Respondent did not discharge the employees or seek to replace them. There is no evidence that any employee received a written reprimand although Muraciov claims that he did speak to Choudri, Wong, and Sosa about their poor work performance. Nayak never spoke to the employees about their performance. Thus, it appears that until the advent of the Union Respondent was lenient with this allegedly poor work performance. Re-

[32] In an affidavit given to the Union on June 27, Sosa stated that he had been discharged on June 27 (Resp. Exh. 3).

[33] G.C. Exh. 12, par. 12.

[34] Diaz was terminated in August after the events in question had occurred. Gotay's status at that point in time is not material to the issues herein.

[35] It is obvious that when Nayak received the State Board letter he realized that immediate action was necessary, it no longer was a matter of only the Union.

[36] Muraciov, as noted, testified that in April he received 18 summonses in one day.

spondent's failure to discharge the employees in April or May indicates that the violations were caused, at least in part, by factors outside of the control of the employees. Nayak and Muraciov both testified that at least some of the problems were caused by the tenants. This record is insufficient to establish a direct relationship between the violations and the work performance of the employees.

In addition to these factors, an examination of the testimony of Nayak and Muraciov as to what occurred on the day the alleged decision to discharge was made reveals some interesting contradictions. Nayak testified that the only specific employee actually discussed at this meeting was Colon. He specifically denied that Gotay and Muraciov spoke about any employee. He also claimed that he signed the checks on June 24, an evident effort to establish that the decision to discharge was made before receipt of the letter from the State Labor Relations Board. Muraciov, on the other hand, testified that several employees were discussed, that both he and Gotay named the employees who should be discharged and determined which one would tell which employee he was discharged. He also testified that the checks were prepared for June 25 and in fact he gave the checks on June 25 to Wong and Choudri.[37] It is evident that there could not be such contradictions on these very important points if such a meeting actually occurred. Furthermore, although Nayak testified that he explained to Muraciov and Gotay that he did not want all the employees discharged at the same time, he nevertheless claimed that he signed all the final checks for all the employees on June 24. Aside from the fact that such an action would be contrary to his alleged philosophy of not burning the old sari until the new one arrived, it is difficult to understand how he could have determined what amount to pay the employees on June 24 since he did not know what day they actually would be discharged. Moreover, why the need for such quick action. The agreement he signed allowed him until September to correct the violations. The more normal procedure to follow would have been to retain even poor employees until new employees were hired. It is impossible to understand how the situation at the complex could be improved with two employees attempting to perform the work of seven employees.[38]

Based on my evaluation of the evidence and the demeanor of the witnesses, I find that the reason advanced by Respondent was not the real reason for the discharge. Respondent, I find, discharged the employees because they joined the Union and this conduct is violative of Section 8(a)(1) and (3) of the Act. However, assuming *arguendo* that Respondent had been dissatisfied with the work performance of its employees and had contemplated discharging them at some point, I find that the union activity of the employees was the trigger which caused the final determination for discharge to be made. This conduct is violative of Section 8(a)(1) and (3) of the Act.[39]

[37] Muraciov testified that it was his practice to prepare a payroll check for an employee only on the day that he actually gave it to the employee.

[38] Respondent argues that the fact that it retained Gotay and Diaz is evidence that union consideration did not play a part in its decision. It is more likely that it retained two employees because it needed some employees, particularly the individual responsible for the boiler operation, in order to continue operating at all.

2. The refusal to bargain

On the basis of this record, I find that on June 13 the Union secured a total of seven cards from the seven employees in the unit herein found to be appropriate. I further find that the cards submitted in support of the Union's majority status are clear and unambiguous and reflect the desire of the employees to be represented by the Union for purposes of collective bargaining. As set forth above, Respondent denies that Gotay was a supervisor within the meaning of the Act and for reasons already delineated I find that he was not a supervisor. However, assuming that Gotay had been found to be a supervisor, this fact, in the circumstances existing herein, would be insufficient to taint the Union's majority status. This is so because this record contains no evidence that the employees signed authorization cards because Gotay misled them into believing that Respondent favored the Union. Nor does it establish that he coercively induced any employee to sign a union card because they feared supervisory retaliation by him.[40] Accordingly I find that the Union represented a majority of Respondent's employees in an appropriate unit since June 13, 1980.

The Union, after securing the authorization cards, forwarded a letter to Respondent wherein it made a demand for recognition and bargaining as a collective-bargaining representative of Respondent's employees. I do not credit Respondent's assertion that the letter was not delivered to it. However, there is no contention that the letter was opened. The issue then is whether in these circumstances it can be argued that Respondent not only had knowledge of the Union but also knowledge of the Union's demand. On this issue of an employer's determination to avoid knowledge of a demand made by a union the court, in *N.L.R.B.* v. *Regal Aluminum, Inc.*, 436 F.2d 525, 527 (7th Cir. 1971), stated the following:

> . . . Under a statute requiring cooperative attitudes to achieve industrial peace, common sense dictates that artificial devices created by the company to avoid knowledge of that demand cannot succeed. Upon its refusal to accept the union's letters the company acted at its own peril as to the contents of the letters. As Mr. Justice Clifford early observed:
>
> [I]t is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notices if it had actually been received. . . . The Lulu, 10 Wall, 192, 201, 77 U.S. 192, 201, 19 L.Ed. 906.

I find that Respondent's refusal to accept the Union's letter was a device to avoid knowledge of the demand

[39] *B. N. Beard Company*, 248 NLRB 198, 210 (1980).

[40] *Industry Products Company*, 251 NLRB 1380 (1980).

and that it acted at its peril. Accordingly, I find that the Union's letter of June 18 constituted a valid demand.

However, while I have found that a demand was made, I do not find that the absence of such a demand would foreclose the Union from a bargaining order. Thus the Board has stated, ". . . It is well established, however, that a demand is not a necessary predicate to the granting of a bargaining order as a remedy for an employer's serious unfair labor practices in violation of provisions of Sec. 8(a)(5)."[41]

There remains the issue of whether the conduct engaged in by Respondent warrants the issuance of a bargaining order. Respondent discharged five of the seven individuals who had signed cards between June 26 and 30 because of their union activities. By this conduct Respondent has destroyed the unit. It is difficult to conceive of a situation where an employer has committed more serious and flagrant unfair labor practices. It is evident that such conduct has the tendency to "undermine [the Union's] majority strength and impede the election process."[42] The possibility of erasing the effects of Respondent's unfair labor practices and of ensuring a fair election by use of traditional remedies is impossible.[43]

As the Board stated in *Trading Port*:

> [The] main concern in granting bargaining orders has been, and is, to correct and give redress for an employer's misconduct and to protect the employees from the effects thereof. To accomplish that result, our policy is, and has been, to provide a full and complete remedy for the unfair labor practices committed and on which the bargaining order is predicated. In the instant case, the Employer has engaged in misconduct, as described above, which violated not only Section 8(a)(1) and (3) of the Act but Section 8(a)(5) as well. In view of the nature of all of the Employer's unfair labor practices, we find that the Employer violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the majority representative of its employees while coterminously engaging in conduct which undermined the Union's majority status and prevented the holding of a fair election.

Accordingly, I find that Respondent has violated Section 8(a)(5) of the Act. I further find that the bargaining obligation commenced on June 26, 1980.

THE REMEDY

As Respondent has been found to have engaged in unfair labor practices, I shall recommend that it take specific action, as set forth below, designed to effectuate the policies of the Act.

In view of the fact that Respondent unlawfully terminated a number of employees, it will be recommended that it be ordered to offer each immediate and full reinstatement to his former position, or, if such is not available, one which is substantially equivalent thereto, without prejudice to his seniority and other rights and privileges. It will further be recommended that each be made whole for any loss of earnings suffered by reason of his termination.

Having found that Respondent by discharging its employees has engaged in serious unfair labor practices which are pervasive and interfere with the holding of a fair election, I find that Respondent has committed a violation of Section 8(a)(5) of the Act by refusing to recognize the Union in an appropriate unit under the circumstances set out above. I further find that Respondent's bargaining obligation began on June 26, 1980.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The below-described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

4. On June 13, 1980, the Union was designated as the majority representative for purposes of collective bargaining of Respondent's employees in the unit described below, which unit constitutes an appropriate unit within the meaning of Section 9(b) of the Act.

> All superintendents, handymen and/or porters employed by Respondent at its premises located at 34–33 90th Street, Queens, New York, exclusive of office clerical employees, guards and supervisors as defined in the Act.

5. Since on or about June 18, 1980, the Union has requested and is continuing to request Respondent to bargain collectively with it as the exclusive bargaining representative of the employees in the unit described above with respect to wages, hours, and other terms and conditions of employment.

6. Since on or about June 26, 1980, and continuing thereafter, Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) by coercively interrogating its employees as to their union sympathies and activities.

7. Since on or about June 26, 1980, and continuing thereafter, Respondent has violated Section 8(a)(1) and (3) of the Act by discharging Jimmie Sosa, Amada Colon, Amjad Ali Choudri, and Tahizjan Ruzehaji[44] because they designated and selected the Union as their collective-bargaining representative and engaged in other activities on behalf of the Union.

8. By refusing to recognize and bargain with the Union, since June 26, 1980, and thereafter, as the majority representative of its employees while coterminously engaging in conduct which undermined the Union's ma-

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[41] *Grandee Beer Distributors, Inc.*, 247 NLRB 1280, fn. 5 (1980); *Tipton Electric Company, et al.*, 242 NLRB 202, 218 (1979).

[42] *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Trading Port, Inc.*, 219 NLRB 298 (1975); *Tipton Electric Company, supra.*

[43] *C. E. Wilkinson & Sons, Inc.*, 255 NLRB 1367, 1378 (1981); *Southern Moldings, Inc.*, 255 NLRB 839 (1981).

[44] The name of Guillermo Wong was withdrawn from the complaint

jority status and prevented the holding of a fair election, Respondent has violated Section 8(a)(1) and (5) of the Act.

ORDER[45]

The Respondent, Medical Investors Association, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their sympathies in and activities on behalf of Local 32B–32J, Service Employees International Union, AFL–CIO, or any other labor organization.

(b) Discharging its employees or otherwise discriminating against them because they engaged in activities on behalf of the Union or any other labor organization.

(c) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All superintendents, handymen and/or porters employed by Respondent at its premises located at 34–33 90th Street, Queens, New York, exclusive of office clerical employees, guards, and supervisors as defined in the Act.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Jimmie Sosa, Amada Colon, Amjad Ali Choudri, and Tahizjan Ruzehaji immediate and full reinstatement to their former positions or, if no positions exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay, together with the interest due thereon, arising from Respondent's discrimination against them.

(b) Upon request, recognize and bargain with the Union as the exclusive bargaining representative of all the employees in the aforesaid unit and, if an understanding is reached, embody such understanding in a written, signed agreement.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay due under the terms of this recommended Order.

(d) Post at its premises at Queens, New York, copies of the attached notice marked "Appendix."[46] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from this Order, what steps Respondent has taken to comply herewith.

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[45] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[46] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."